

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALAN CROWELL)	
Claimant)	
VS.)	
)	DOCKET NOS. 183,353 and 183,354
FRITO-LAY, INC.)	
Respondent)	
AND)	
)	
KEMPER RISK MANAGEMENT)	
Insurance Carrier)	

ORDER

ON the 1st day of February, 1994, the application of the respondent for review by the Workers Compensation Appeals Board of an Order entered by Administrative Law Judge James R. Ward, on December 1, 1993, came on before the Appeals Board for oral argument.

APPEARANCES

The claimant appeared by and through his attorney, Eric Kjorlie of Topeka, Kansas. The respondent and insurance carrier appeared by and through their attorney, James C. Wright of Topeka, Kansas. There were no other appearances.

RECORD

(1) The record consists of the documents filed of record with the division in this docketed matter including the transcript of preliminary hearing held before The Honorable James R. Ward, Administrative Law Judge, dated December 1, 1993, and the exhibits attached thereto.

(2) The record further includes the medical records of Dr. Brett E. Wallace placed into evidence subsequent to the preliminary hearing by agreement of the parties.

ISSUES

(1) Whether the claimant met with a compensable injury arising out of and in the course of his employment on May 28, 1993.

(2) Whether claimant is entitled to temporary total disability compensation as a result of an injury arising out of and in the course of his employment on May 28, 1993.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purpose of preliminary hearing, the Appeals Board finds:

(1) That claimant's accidental injury of May 28, 1993, did arise out of and in the course of his employment with Frito-Lay, Inc., and claimant is entitled to temporary total disability benefits and medical treatment therefrom.

The claimant, a palletizer with Frito-Lay, Inc., suffered injury on March 2, 1993, while bending over to pick up a 60 - 70 pound pallet. He experienced pain from his low back into his buttocks and leg.

The claimant was paid temporary total disability compensation from March 9, 1993, through April 4, 1993. On April 5, 1993, claimant was returned to part-time work and was paid temporary partial from that date through May 1, 1993, at which time he was returned to full-time employment with the only restriction being no overtime work.

Claimant worked through most of May at his regular job as a palletizer. On May 28, 1993, he began a regularly scheduled vacation. While at home he bent over to splash water on a wasp floating in his swimming pool and suffered a serious onset of pain, so severe that it caused him to fall to the ground. Claimant was taken to the hospital in an ambulance and was hospitalized for a period of time.

The issue before the Board was whether the incident of May 28, 1993, constituted a new and intervening injury or whether a plausible connection existed between the injury of March 2, 1993, and the subsequent aggravation of May 28, 1993, showing the latter to be a direct and natural result of the primary injury.

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to the particular case. Messenger v. Sage Drilling Co., 9 Kan. App. 2d 435, 440, 680 P.2d 556 (1984) .

K.S.A. 44-501(a) states in part:

"If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true," on the basis of the whole record.

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984)

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury. Gillig v. Cities Service Gas Co., 222 Kan. 369, 372, 564 P.2d 548 (1977)

As a result of the agreement between the attorneys, the medical records of Dr. Brett Wallace of December 8, 1993, were placed into evidence. Dr. Wallace opined in his report that the claimant's problems were a natural consequence of the lumbar disease which manifested itself as an injury on April 2, 1993. As no claim for an April 2, 1993, injury was filed by the claimant, the Appeals Board assumes the medical records of Dr. Wallace misdated the injury date of March 2, 1993.

Dr. Wallace goes on to state that Mr. Crowell was hospitalized for a condition which was a direct continuation of the injury suffered on April 2, 1993.

Uncontradicted evidence which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976) In this instance the Appeals Board finds that the claimant's injury of May 28, 1993, was a reasonable and natural consequence of claimant's earlier injury of March 2, 1993. The Board further finds that this is a direct continuation of the prior injury and lumbar disease which had earlier manifested itself. The medical records of Dr. Wallace, while slightly inaccurate in dates, are a persuasive indication that claimant's ongoing problems are a direct and natural consequence of the March 2, 1993, injury which arose out of and in the course of claimant's employment with the respondent.

(2) Claimant was temporarily totally disabled from employment from and after May 28, 1993, through December 8, 1993.

The December 8, 1993, medical records of Dr. Wallace, created in response to a letter from claimant's attorney, Mr. Kjorlie, state "I do think that I could state Mr. Crowell has obtained the maximum medical improvement without his rating." The uncontradictive medical evidence indicates that Mr. Crowell's period of temporary total disability ended as of December 8, 1993. The Order of Administrative Law Judge James R. Ward grants temporary total disability commencing May 29, 1993, until the claimant is certified by Brett E. Wallace, M.D., as having reached maximum medical improvement. It would appear therefore that the temporary total disability period of the claimant would cease on December 8, 1993.

ORDER

WHEREFORE, it is the finding, decision, and order of the Appeals Board that claimant has proven by a preponderance of the credible evidence his injury of May 28, 1993, was a direct and natural consequence of the March 2, 1993, injury and did arise out of and in the course of his employment, thus being compensable.

The Appeals Board further finds that the December 1, 1993, Order for Compensation of Administrative Law Judge James R. Ward is affirmed in that claimant is entitled to temporary total disability compensation commencing May 29, 1993, and modified in that the temporary total compensation shall cease effective December 8, 1993.

The Order of Administrative Law Judge James R. Ward granting medical treatment with Dr. Brett E. Wallace to be paid by the respondent and insurance carrier on claimant's behalf remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of March, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Eric Kjorlie, 434 S. Topeka Avenue, Topeka, KS 66603
James C. Wright, 534 S. Kansas, Suite 1400, Topeka, KS 66603-3408
James R. Ward, Administrative Law Judge
George Gomez, Director